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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Implement
the Commission's Procurement Incentive
Framework and to Examine the Integration
of Greenhouse Gas Emissions Standards into
Procurement Policies.

R.06-04-009

**REPLY COMMENTS OF
CONSTELLATION NEWENERGY, INC., CONSTELLATION ENERGY
COMMODITIES GROUP, INC. AND CONSTELLATION GENERATION GROUP, LLC
ON DRAFT DECISION OF PRESIDENT PEEVEY AND ALJ GOTTSTEIN
ON PHASE 1 ISSUES**

January 8, 2007

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Pursuant to Rule 14.3(d) of the California Public Utilities Commission ("CPUC") Rules of Practice and Procedure, Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc., and Constellation Generation Group, LLC (collectively, "Constellation") hereby provide these reply comments on the December 13, 2006 *Proposed Decision of President Peevey and ALJ Gottstein, Interim Opinion on Phase 1 Issues: Greenhouse Gas Emissions Performance Standard*. ("Proposed Decision" or "PD"). Consistent with Rule 14.3(d), these reply comments focus on misstatements of law, fact or the state of the record found in the January 2 comments of NRDC *et al*¹ and PG&E², as well as failures to have opening comments conform with Rule 14.3(c). Both the NRDC and PG&E's respective comments misstate law and facts with respect to their call for application of the emission performance standard ("EPS") on a "pre-approval" basis, rather than through the annual attestation mechanism adopted in the PD. These comments should be given no weight. SCE and CMUA repeat arguments that suggest the public utilities can, under a hyper-technical reading of the statute, circumvent the overarching goal of SB 1368

¹ *Comments Of The Natural Resources Defense Council (NRDC), The Utility Reform Network (TURN), And The Union Of Concerned Scientists (UCS) On The Draft "Interim Opinion On Phase 1 Issues: Greenhouse Gas Emissions Performance Standard"*, ("NRDC et al") January 2, 2006, particularly pages 4-5, and Appendix pages 13-16.

² *Opening Comments Of Pacific Gas And Electric Company (U 39 E) On Proposed Decision Of President Peevey And ALJ Gottstein*, January 2, 2006, particularly pages 8-9.

by allowing major investments in existing assets that cannot meet the EPS.³ Those re-arguments should be given no weight.

I. Reply Comments.

PG&E argues that it would be discriminatory to have a different approach for the non-public utility load serving entities (LSEs) to verify EPS compliance on an annual *ex post* basis through the attestation process adopted in the PD.⁴ PG&E misstates fact and law insofar as this argument denies the existence of fundamental distinctions in the Commission’s jurisdictional and regulatory relationships with public utility electrical corporations like PG&E and the Commission’s roles with respect to other types of LSEs. PG&E’s argument rests upon the flawed premise that non-public utility LSEs are subject to the same procurement review and oversight as the public utilities, and therefore the EPS compliance mechanisms should be the same.

NRDC *et al*’s comments suffer from the same foundational problem, but also exemplify a significant misunderstanding of the distinctions between public utilities and non-public utilities, existing Commission practices, and how ESPs compete. By arguing “that upfront approval is the most administratively simple and effective means of enforcing the EPS to best serve the interests of California customers”⁵, NRDC misstates facts and law. ESPs are not subject to the Pub. Util. § 454.5 regulatory structure that oversees the procurement planning processes (and risk protections) applicable to public utilities. There is absolutely nothing “administratively simple” if some new review mechanism would require development out of whole cloth. Moreover, it would not serve the interests of California’s direct access customers—or their significant position in California’s economy—by undermining the business and risk management models of ESPs through the imposition of extensive commercial delays associated with procurement review. Furthermore, NRDC’s argument for such profound and far-reaching changes in the existing regulatory framework with respect to ESPs are wholly inappropriate to consider in the context of a rulemaking to implement SB 1368.

³ See SCE Comments, pages 2-6; CMUA comments, pages 7-9.

⁴ PG&E Comments, page 8.

⁵ NRDC *et al*’s Comments, page 4.

NRDC *et al* and PG&E's arguments seeking a "one size fits all" EPS program were previously made and ultimately rejected in the PD⁶. Their comments constitute simple re-argument, and should be afforded no weight under Rule 14.3(c). Furthermore, NRDC's suggested revisions to the PD found in its Appendix, pages 13-16, should be disregarded.

The PD properly reflects the Commission's authority under SB 1368 to exercise its discretion in the implementation of that statute and to recognize fundamental distinctions in the Commission's regulatory relationship with public utility electrical corporations like PG&E, and non-public utility LSEs, like the ESPs. The PD's *ex post* attestation mechanism for non-public utility LSEs strikes an appropriate balance and should not be changed as NRDC and PG&E suggest.

With respect to the application of the EPS to utility retained generation, SCE continues to argue its hyper-technical interpretation of the statute, pointing to its prior "missing comma" argument and suggesting that the PD fails to explain its rejection of that argument. In fact, SCE explicitly reargues that SB 1368 was not intended to impact existing ownership interests in non-EPS compliant resources as long as those resources are already in the public utility's ownership.⁷ This argument is not persuasive, particularly when SCE's advocacy for such a major loophole to the overarching purpose of the statute is compared to the Senate Floor Analysis (and other legislative analysis) statement that, "The purpose of this bill is to prevent long-term investments in power plants with GHG emissions in excess of those produced by a combined-cycle natural

⁶ See, *Comments Of Pacific Gas And Electric Company (U 39 E) On Final Staff Recommendations On Greenhouse Gas Emissions Performance Standard Pursuant To SB 1368*, October 18, 2006, pages 6-7 [re "documentation" argument]; *Opening Comments/Legal Brief On Final Workshop Report And Staff Recommendations Regarding The Greenhouse Gas Emissions Performance Standard Of The Natural Resources Defense Council (NRDC), The Utility Reform Network (TURN), The Union Of Concerned Scientists (UCS), And The Western Resource Advocates (WRA)*, October 18, 2006, page 7 [all LSEs should subject to up-front review], with citation in footnote 1 to same argument made in *Reply Comments on Draft Workshop Report Regarding the Greenhouse Gas Emissions Performance Standard of the Natural Resources Defense Council (NRDC), The Utility Reform Network (TURN), the Union of Concerned Scientists (UCS), and the Western Resource Advocates (WRA)*, September 15, 2006, p. 5; See also, *Reply Comments/Legal Brief On Final Workshop Report And Staff Recommendations Regarding The Greenhouse Gas Emissions Performance Standard Of The Natural Resources Defense Council (NRDC), The Utility Reform Network (TURN), The Union Of Concerned Scientists (UCS), And The Western Resource Advocates (WRA)*, October 27, 2006, page 9.[upfront enforcement].

⁷ SCE Comments, page 5, "The policy was not to shut down existing coal-fired plants. Thus, the Legislature could not have meant to preclude investment in replacement parts or refurbishment of existing parts in an existing pulverized coal-fired generating plant, which are necessary to keep an existing plant running to serve the public. If the Legislature intended such a meaning it would have used words to make it clear that such things as replacement of equipment and repairs to existing plant are included within the scope of the statute. The PD's interpretation of the term "new ownership investments" is therefore wrong and must be corrected to avoid the risk of preventing needed repairs of existing facilities."

gas power plant.”⁸ Similarly, CMUA’s argument to exclude the application of the EPS to existing utility-owned generation essentially asserts that it was the Legislature’s intent to allow repowering and significant investments by LSEs in non-EPS compliant assets.⁹

On the topic of unspecified resources, PG&E identifies another problem area associated with forbidding use of these contracts in relation to the reliability / firming requirement associated with certain RPS commitments.¹⁰ Constellation agrees with PG&E that unspecified contracts, whether for substitute energy, firming or other purposes, provides critical liquidity to the markets.¹¹ However, rather than allowing a single, preferential carve out as requested by PG&E¹², the Commission should reconsider the prohibition in light of the additional regional wholesale market and reliability problems that will result as identified in Constellation’s comments¹³, as well as those of SMUD¹⁴ and Morgan Stanley, *et al*¹⁵. The comments highlighting the extensive market and reliability ramifications from such a prohibition constitute corrections to the state of the record used by the PD insofar as there was no focus or dialogue during workshops or prior filings on the workshop reports advocating such a prohibition or illuminating the harm that would likely result. Accordingly, Constellation urges the Commission to reconsider the prohibition on unspecified contracts and remove those elements of the PD.

⁸ See, Senate Rules Committee, Office of Senate Floor Analysis, August 30, 2006, page 6, posted at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1351-1400/sb_1368_cfa_20060831_111932_sen_floor.html. See also, August 24, 2006 Senate Floor Analysis (posted at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1351-1400/sb_1368_cfa_20060830_190221_sen_floor.html), Assembly Floor Analysis, August 22, 2006, page D, (posted at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1351-1400/sb_1368_cfa_20060822_200706_asm_floor.html); Assembly Appropriations Committee Analysis, August 15, 2006, page 4 (posted at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1351-1400/sb_1368_cfa_20060815_163646_asm_comm.html); Assembly Natural Resources Committee Analysis, June 29, 2006, (Posted at http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_1351-1400/sb_1368_cfa_20060629_151010_asm_comm.html).

⁹ CMUA Comments, pages 7- 9, and esp. pg 9, “Therefore, an LTFC does not include expenditures by an existing owner on existing generating units. Such things as expenditures for capacity increases to a unit, repowering a unit ... are not new ownership investments.”

¹⁰ PG&E Comments, pages 2-7.

¹¹ PG&E Comments, pages 6-7.

¹² PG&E Comments, page 7.

¹³ See, *Comments Of Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. And Constellation Generation Group, LLC On Draft Decision Of President Peevey And ALJ Gottstein On Phase 1 Issues*, January 2, 2006, pages 2-3. (“Constellation Comments”).

¹⁴ See, *Comments of the Sacramento Municipal Utility District on the December 13, 2006 Proposed Decision*, January 2, 2006, pages 3-9. (“SMUD Comments”).

¹⁵ See, *Comments of Barclays Capital, J Aron & Company, Morgan Stanley Capital Group, Inc., on Proposed Decision on Phase 1 Issues*, January 2, 2006. (“Morgan Stanley, *et al* Comments”).

II. Conclusion

Constellation applauds the Commission's significant efforts in developing the EPS policies and implementation of SB 1368. For the reasons described herein, and consistent with Rule 14.3, Constellation urges the rejection of the NRDC and PG&E arguments seeking a "one size fits all" approach to the EPS, asks that the Commission remove the prohibition on unspecified contracts, and keep the provisions of the PD that require that any substantive financial commitments in utility retained generation also satisfy the EPS.

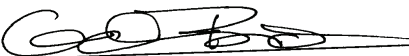
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Certificate of Service

I hereby certify that I have this day served a copy of *Reply Comments Of Constellation NewEnergy, Inc., Constellation Energy Commodities Group, Inc. And Constellation Generation Group, LLC On Draft Decision Of President Peevey And ALJ Gottstein On Phase 1 Issues* on all known parties to R.06-04-009 by transmitting an e-mail message with the document attached to each party named in the official service list. Parties without e-mail addresses were mailed a properly addressed copy by first-class mail with postage prepaid.

Executed on January 8, 2007 at Sacramento, California

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